

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION**

IN RE: POLYURETHANE FOAM
ANTITRUST LITIGATION

**Lead Case 5:10-cv-111 and
MDL No. 2196**

**RESPONSE TO MOTION TO
INTERVENE**

INTRODUCTION

On August 20, 2010, Plaintiffs Piazza's Carpet & Tile Co. Inc. ("Piazza"); Jamestown Mattress Co., Inc.; Thompson Trading Company; Shoreline Carpet Supplies, Inc.; and V&M, Inc. d/b/a Costa International filed the Joint Motion for Consolidation of Related Cases and For Appointment of Interim Co-Lead and Liaison Counsel (the "Motion"), seeking consolidation of the five then-pending related cases (and the seven additional related cases that have since been filed in this District) and appointment of interim co-lead and liaison counsel.¹

On September 3, 2010, Alyanna Enterprises, Inc., D/B/A The Mattress Maker ("Alyanna"), plaintiff in one of the actions pending in the Northern District of Ohio,

¹ Since the filing of the first complaint by Plaintiffs Piazza, three actions have been filed in the Northern District of Ohio and one action has been filed in the Central District of California, all alleging violations of antitrust law stemming from the same conspiracy alleged in the consolidated cases at bar. On August 25, 2010, Piazza filed a Motion for Transfer and Consolidation or Coordination of Related Antitrust Actions For Pretrial Proceedings Pursuant to 28 U.S.C. § 1407 (the "Transfer Motion") before the Judicial Panel on Multidistrict Litigation (the "Panel" or "JPML"), seeking transfer of all allegedly related cases to this District.

moved to intervene in this action pursuant to Fed. R. Civ. P. 24(a)(2) for the limited purpose of objecting to the *timing* of the appointment of interim co-lead counsel.

On September 13, 2010, this Court granted the portion of Plaintiffs' motion seeking consolidation of the North Carolina actions, consolidating the 12 related cases now pending before this Court. This Court also held that it would "defer ruling on the Motion for Appointment of Interim Co-Lead and Liaison Counsel as interim appointment because it "appears unnecessary at this time." *See* Docket No. 20, Order dated September 13, 2010 at 4. Plaintiffs do not oppose this approach to deferring ruling on appointment of Interim Co-Lead and Liaison Counsel until such time as the Court deems appropriate. Moreover, Plaintiffs do not oppose Alyanna's motion to intervene to be heard on this issue, while reserving Plaintiffs' rights to oppose Alyanna's position on the merits. However, if the Court is inclined to designate counsel to act on behalf of the consolidated North Carolina actions until such time when the appointment of Interim Co-Lead and Liaison Counsel is made, the basis is set forth below.

ARGUMENT

Before this Court appoints Interim Co-Lead Counsel, there may be benefits to appointing counsel – on a short term basis -- to speak on behalf of all North Carolina Plaintiffs until the J.P.M.L. rules. Even though the North Carolina Plaintiffs have agreed that Defendants do not have to answer the Complaints until after the J.P.M.L. rules, there are numerous issues that the parties can negotiate and handle prior to the ultimate determination by the Judicial Panel. For example, such counsel could provide one point of contact for negotiations between parties, permit the sensible progression of work to begin in the case in a coordinated fashion (*e.g.*, the drafting of protective orders, case

management orders), and discuss preservation and negotiating protocols regarding the production of Electronically Stored Information (“ESI”).

Alyanna suggests that appointment of interim lead counsel here would be premature given the pending Transfer Motion. Br. at 4. The filing of the Transfer Motion before the JPML, however, does not require this Court to defer its consideration of the interim leadership Motion. In fact, the J.P.M.L. rules specifically support Plaintiffs’ position here. *See* J.P.M.L. Rule 1.5 (“The pendency of a motion . . . before the Panel concerning transfer . . . of an action pursuant to 28 U.S.C. § 1407 *does not affect or suspend orders and pretrial proceedings in the district court* in which the action is pending. . .”) (emphasis added). Similarly, with regard to this specific cases and the others pending before the Panel, the JPML noted in a letter to this Court and others that “[w]hile this [transfer] motion remains pending, *you are free to rule* on any pending motion.” *See* Letter To Involved Judges, dated August 31, 2010 from U.S. Judicial Panel on Multidistrict Litigation (attached hereto as Exhibit A) (emphasis added).²

All counsel in the twelve filed cases in North Carolina support the appointment of Hausfeld LLP and Boies Schiller and Flexner, LLP as interim co-lead counsel in this action, and The Van Winkle Law Firm as interim liaison counsel. Alyanna also does not contest the ability of these firms to serve in these roles.³

² Given the foregoing, numerous courts have chosen to reject arguments by parties seeking to delay consolidation and appointment orders until after the JPML rules. *See e.g.*, Order, *In re Hydrogen Peroxide Antitrust Litigation* (“*In re HP*”) (granting appointment of lead counsel *before* transfer of cases by the Judicial Panel of Multidistrict Litigation and noting that the issue can always be reconsidered after the JPML rules) (attached hereto as Exhibit B); *see also* Order, *In re Egg Producers Litig.*, 2:08-cv-04819-GP (Nov. 5, 2008) (attached as Exhibit C) (appointing lead counsel before transfer of cases); *The Albert Fadem Trust v. WorldCom, Inc.*, 2002 WL 1485257 (S.D.N.Y. July 12, 2002) (court declines to delay consolidation and leadership consideration until after the Panel rules); *In re: Duke Energy Corp. Securities Litigation*, 2002 WL 1933798 (S.D.N.Y.) (same).

³ *See* Br. at 4, n.3 (“Alyanna emphasizes that this motion is *not* intended to address the merits of the Lead Counsel Motion or to suggest that the firms who have sought lead counsel status are not qualified to serve

Dated: September 17, 2010.

Respectfully submitted,

THE VAN WINKLE LAW FIRM

By: s/ Larry McDevitt

Larry S. McDevitt
David M. Wilkerson
11 North Market Street
Asheville, NC 28801
Telephone: 828-258-2991
Fax: 828-255-0255
E mail: dwilkerson@vwlawfirm.com

BOIES, SCHILLER & FLEXNER LLP

William A. Isaacson
Melissa B. Willett
5301 Wisconsin Avenue, NW
Washington, DC 20015
Telephone: 202-237-2727
Fax: 202-237-6131
E mail: wisaacson@bsflp.com

HAUSFELD LLP

Michael D. Hausfeld
Megan E. Jones (NC Bar No. 26923)
James J. Pizzirusso
Sathya S. Gosselin
1700 K St., NW, Ste. 650
Washington, DC 20006
Telephone: 202-540-7200
Fax: 202-540-7201
E mail: mhausfeld@hausfeldllp.com

in that role. This opposition merely addresses the *timing* of the Lead Counsel Motion, not its substance.”) (emphasis in original).

ARTHUR N. BAILEY & ASSOCIATES

Arthur N. Bailey, Esq.
111 West Second Street
Jamestown, New York 14701
Tel: 716.664.2967
Fax: 716.664.2983
Email: artlaw@windstream.net

Counsel for Plaintiffs Piazza's and
Jamestown Mattress

NUSSBAUM LLP Linda P. Nussbaum John D. Radice 88 Pine Street, 14th Floor New York, NY 10005 Tel: (212) 838-7797 Fax: (212) 838-7745 lnussbaum@nussbaumllp.com jradice@nussbaumllp.com www.nussbaumllp.com	CRIDEN & LOVE, P.A. Michael Criden Kevin Love 7301 S.W. 57th Court, Suite 515 South Miami, Florida 33143 Tel: 305.357.9000 Fax: 305.357.9050 klove@cridenlove.com
KOHN, SWIFT & GRAF, P.C. Joseph Kohn One South Broad Street Suite 2100 Philadelphia, PA 19107 Tel: 215 238-1700 Fax: 215 238-1968 jkohn@kohnsswift.com	FARUQI & FARUQI, LLP Ken Zylstra Peter Kohn 101 Greenwood Avenue, Suite 600 Jenkintown, PA 19046 T: (215) 277-5770 F: (215) 277-5771 kzylstra@faruqilaw.com pkohn@faruqilaw.com www.faruqilaw.com
TAUS, CEBULASH & LANDAU, LLP Barry Taus Kevin Landau 80 Maiden Lane, Suite 1204 New York, NY 10038 Tel: 212.931.0704 btaus@tcclaw.com klandau@tcclaw.com www.tcclaw.com	CAFFERTY FAUCHER Bryan L. Clobes Ellen Meriwether 1717 Arch St., Suite 3610 Philadelphia, PA 19103 (215) 864-2800 (Office) (215) 864-2810 (fax) www.caffertyfaucher.com
WITES & KAPETAN, P.A.	

<p>Marc A. Wites 4400 North Federal Highway Lighthouse Point, FL 33064 (954) 570-8989 (phone) (954) 354-0205 (fax) mwites@wklawyers.com</p>	
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Counsel for Plaintiff Thompson

<p>GRAY, LAYTON, KERSH, SOLOMON, SIGMON, FURR & SMITH PA William E. Moore 516 South New Hope Road P.O. Box 2636 Gastonia, NC 28053-2636 Tel: (704) 865-4400 Fax: (704) 866-8010 bmoore@gastonlegal.com</p>	<p>LABATON SUCHAROW LLP Bernard Persky Hollis L. Salzman Kellie Lerner Morissa R. Falk 140 Broadway New York, NY 10005 Tel: (212) 907-0700 Fax: (212) 818-0477 bpersky@labaton.com hsalzman@labaton.com klerner@labaton.com mfalk@labaton.com</p>
--	--

Counsel for Plaintiff Shore-Line

<p>HEINS MILLS & OLSON, P.L.C. Vincent J. Esades 310 Clifton Avenue Minneapolis, MN 55403 Tel: 612-338-4605 vesades@heinsmills.com</p>	<p>PRETI, FLAHERTY, BELIVEAU & PACHIOS, LLP Gregory P. Hansel One City Center P.O. Box 9546 Portland, ME 04112-9546 Tel. 207-791-3000 Fax 207-791-3111 ghansel@preti.com</p>
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Counsel for Plaintiff V & M

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing **RESPONSE TO MOTION TO INTERVENE** was filed with the Clerk of Court on September 17, 2010, using ECF, which will send notification of such filing to the following, and the document is available for viewing and downloading from ECF:

Max O. Cogburn, Jr., Esq. mcogburn@cobralawfirm.com
Everett J. Bowman ebowman@rbh.com, edeal@rbh.com, rkennedy@rbh.com
Lawrence C. Moore, III lmoore@rbh.com, kvecchio@rbh.com, ncable@rbh.com
Frank A Hirsch, Jr frank.hirsch@alston.com, brenda.cameron@alston.com,
judy.bang@alston.com, tami.chasse@alston.com
Rebecca Karen Cheney bcheney@lawhms.com
Jennie Cordis Boswell jennie.boswell@alston.com, cathy.lee@alston.com
Matthew Patrick McGuire matt.mcguire@alston.com, brenda.cameron@alston.com,
judy.bang@alston.com, tami.chasse@alston.com
Morissa R. Falk mfalk@labaton.com
Jason D. Evans jevans@mcguirewoods.com, mdunn@mcguirewoods.com
Michael Don Mustard mmustard@hsk-law.com
Kendall Millard kmillard@btlaw.com, cstamas@btlaw.com, lroberts@btlaw.com,
wasbury@btlaw.com
Timothy J. Coleman tim.coleman@freshfields.com

I further certify that I have served the document by first-class mail, postage prepaid, on the following non CM/ECF participants:

Scottdel, Inc.
c/o Louis A. Carson
400 Church Street
Swanton, OH 43558

Shep Goldfein
Elliot Silver
Skadden, Arps, Slate, Meagher & Flom
LLP
Four Times Square
New York, NY 10036

Francis Patrick Newell
Kevin T. Kerns
Peter M. Ryan
Cozen and O'Conner
1900 Market Street
Philadelphia, PA 19103

Edward G. Warin
John P. Passarelli
Kutak Rock LLP
1650 Farnam Street
Omaha, NE 68102-2186

Daniel G. Swanson
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071

D. Jarrett Arp
Cynthia Richman
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., NW
Washington, DC 20003

Executed this 17th day of September, 2010.

s/ David Wilkerson
David Wilkerson